SUPREME COURT OF NOVA SCOTIA
Citation: *Bank of Nova Scotia v. Hatcher*, 2017 NSSC 257

Date: 20170927
Docket: Hfx No. 441235
Registry: Halifax

Between:

The Bank of Nova Scotia

Plaintiff

v.

Daniel S. Hatcher

Defendant

D E C I S I O N

Judge:	The Honourable Justice Glen G. McDougall
Heard:	July 20, 2016, in Halifax, Nova Scotia
Final Written Submissions:	July 22, 2016 and September 1, 2016
Written Decision:	September 27, 2017
Counsel:	Stephen Kingston and Christopher Lirette, for the Plaintiff

By the Court:

[1] On the 21st day of September, 2015, the Bank of Nova Scotia ("the Bank") was granted an Order for Foreclosure, Sale and Possession against the property of Danial S. Hatcher located at Civic No. 41 Forman Street, North Sydney, Nova Scotia.

[2] The property was sold at Public Auction to the highest bidder, the Bank, on October 30, 2015.

[3] An Order Confirming Sale was approved by the Prothonotary and issued on the 19th day of January, 2016.

[4] A Notice of Motion seeking an Order for Deficiency Judgment was filed with the Court on April 29, 2016. The motion was initially scheduled to be heard on June 16, 2016.

[5] The Honourable Justice Gerald R.P. Moir of our Court provided counsel for the Bank an opportunity to gather additional information to support the Bank's claim for protective disbursements. In granting the adjournment, Justice Moir, in correspondence sent to the Bank's counsel bearing date of June 17, 2016, stated:

> As I have said in rulings on several motions for deficiency judgment, Associate Chief Justice Smith's decision in *Scotia Mortgage Corporation v. Fogarty*, 2016 NSSC 52 did not establish principles of law, so much as it undermined the credibility of property managers. Therefore, I refused to include in the calculations of deficiency judgments property manager expenses that were not supported by an invoice or receipt from an independent contractor.

Justice Moir went on to indicate that:

> … I said that property managers could attempt to revive their credibility, in which case I would consider their actual expenses and whether they should recover something for general overhead and profit. You proposed affidavits of Ms. Tammie Gaetz which supplied better proof and explanation. I still refused the property manager's own expenses until a witness took the stand and dealt with the damage to credibility caused by the property manager's witness in *Scotia Mortgage Corporation v. Fogarty*.

[6] Unanticipated scheduling problems prevented the matter from coming back before Justice Moir. It, instead, was argued before me on July 20, 2016. In all, six separate motions for deficiency judgment were brought before me but the focus was directed towards the Bank's claim against Mr. Hatcher. Mr. Hatcher did not participate, either in person or through counsel, despite having been personally served with notice of the hearing on June 30, 2016. Perhaps the fact that he was a guest of Her Majesty the Queen at the Westmoreland Institution in Dorchester, New Brunswick at the time he was served might have had something to do with this. In any event, no communication from, or on behalf of Mr. Hatcher, has been received. The Court was satisfied that the matter could proceed in his absence. I am reminded, however, of what Associate Chief Justice Deborah K. Smith said in ***Scotia Mortgage Corporation v. Fogarty***, *supra*, at para. 27:

> 27 … In the vast majority of these types of motions, the proceeding is undefended. This, in my view, heightens the obligation on plaintiff's counsel to ensure that the court is properly apprised of all relevant matters relating to the motion, including the issue of relevant documentation that has not been disclosed.

[7] I propose to render a decision that specifically deals with the deficiency judgment sought by the Bank against Mr. Hatcher. My decision is also intended to provide general directions to counsel in relation to five other files that are being held pending this decision. Upon release of my decision, Mr. Kingston, as counsel, may wish to amend his clients' claims and submit them to me to for further consideration..

[8] These other five files are:

1. Scotia Mortgage Corporation - and - Paul Andrew Terrio and Brandy E. Terrio (Hfx No. 437256);
2. The Bank of Nova Scotia - and - Gerald Hayward Vivian and Kelly-Lynn Vivian (Hfx No. 437690);
3. Scotia Mortgage Corporation - and – Philip Nathan Newell (Hfx No. 439300);
4. The Bank of Nova Scotia - and – Michael Thomas Jonathan Hynes and Khristal Rose Hynes (Hfx No. 441658); and,
5. The Bank of Nova Scotia - and – Holly Michelle LeJeune-DeWolfe and Steven Thomas DeWolfe (Hfx No. 441714).

The Bank of Nova Scotia's Claim for Deficiency Against Daniel S. Hatcher:

[9] The Bank's claim against Mr. Hatcher is set out on pages three and four of counsel's brief dated June 3, 2016 (filed June 6, 2016). The calculations supporting the total deficiency claim of $27,653.56, as taken from Mr. Kingston's memorandum, can be reproduced as follows:

Principal Debt (from Foreclosure Order)	$95,612.61
Interest from September 21, 2015 to October 30, 2015 on $93,491.61 (39 days at $7.66 per day)	$298.74
Taxed Costs	$4,903.82
Total Amount Claimed	$100,815.17
Amount Realized	
Gross sale proceeds (from Appraisal)	$83,000.00
Less Property Management fees	($5,336.21)
Less fees and taxes (from Foreclosure Sale Report)	($3,102.38)
Net amount realized	$74,561.41
Deficiency	
Total Amount Claimed	$100,615.17
Less Total Amount realized	($74,561.41)
Remainder	$26,253.76
Plus interest at 2.99% from October 30, 2015 to November 19, 2015 (20 days @ $2.15 per day)	$43.00
Plus interest on $26,296.76 at 5% from November 20, 2015 to July 15, 2016 (238 days at $3.60 per day)	$856.00
Total	$27,153.56
Plus Costs	$500.00
TOTAL DEFICIENCY CLAIM	**$27,653.56**

Evidence in Support of the Claim:

[10] The evidence provided to support this claim is contained in two affidavits.

[11] An affidavit of counsel sets out the steps taken to first sell the property at public auction pursuant to the Order for Foreclosure, Sale and Possession. It then goes on to describe the additional efforts made to re-sell the property at fair market value in accordance with conventional real estate marketing practices.

[12] In order to proceed with the motion to determine the proper deficiency judgment amount, the Bank had to rely on a real estate appraisal which set the property's fair market value at $83,000.00, as of September 25, 2015. It is quite customary to rely on appraisals to establish a deficiency judgment amount. As noted by the Honourable Justice Nancy Bateman in ***Royal Bank of Canada v. Marjen Investments Ltd.*** (1998), 164 NSR (2d) 293 (NSCA) at para 31:

> 31 The Court's focus on an application for deficiency judgment on foreclosure is to ensure that the mortgagee recovers no more than "is just and reasonable" (per Hart, J.A. in *Adshade, supra*). When the mortgagee has purchased the property at the Sheriff's sale, and applies for a deficiency judgment, prior to resale, it is reasonable for the Court to look to objective evidence of value (per Hallett, J.A. in *Nova Scotia Savings and Loan v. MacKay, supra*). It may be that the price paid by the mortgagee at the sale is an acceptable amount, particularly where there has been competitive bidding. On the other hand, the purchase price may be nominal, in which case, it is appropriate to assign a more realistic value. This ensures that the mortgagee does not, after obtaining a deficiency judgment, resell the property for an amount greater than the price paid at the Sheriff's sale and thereby effect double recovery. Where the property has not been resold, the best evidence of value is generally established through appraisals. When the property has been resold, however, and, particularly, when subjected to vigorous marketing efforts, as in *Offman, supra*, the Court should generally not depart from the selling price. Appraisal reports are a best guess, albeit by a person experienced in the real estate field. It is the market that actually determines the value of the property.

[13] In addition to the affidavit of counsel, an employee of the property management company retained by the lender or its' agent provided further particulars of the goods and services supplied to secure and maintain the property after the lender took possession.

[14] According to the affidavit of Tammy Gaetz, an employee of Veranova Properties Limited ("Veranova"), Veranova was retained by the Bank to manage the defendant's property on June 26, 2015.

[15] Veranova then retained an independent contractor or field agent, as Veranova calls them, to attend at the property and to prepare a Securing Report, so-called, which describes the overall condition of the property. The field agent also identifies any safety or environmental concerns that might exist. Arrangements are made to re-direct electrical power bills and water bills, if necessary. Veranova assumes responsibility for the payment of all services required to properly heat and maintain the premises until such time as it is sold.

[16] If the mortgagee buys-in at the public auction and provided "*the mortgagor has so contracted and the mortgagee has so pled*" (See Practice Memorandum 1, Part III, paragraph 3.5(a) – Claim for Deficiency), *Civil Procedure Rule* 72.12(1)(a) allows a mortgagee to seek an assessment of a deficiency provided the notice of motion is filed prior to the expiration of "*six months after the effective date of the default judgment, if the sale is by public auction.*"

[17] Rule 72.11(3)(a) states:

> (3) The effective date of the default judgment is fifteen days after the applicable of the following dates:
>
> (a) the date of a sale by public auction, if the mortgagee purchases the property;

In those instances where the property remains vested in the name of the mortgagee, the filing of a motion to assess a deficiency judgment amount cannot be delayed beyond the six-month deadline. Rather, and as stated previously herein, the calculation of the deficiency judgment amount must then proceed based on an acceptable real estate appraisal. It is not enough to file the notice of motion and supporting documentation within the six-month period only then to seek continued adjournments until the property is sold. [Reference to ***Royal Bank of Canada v. Christanson***, 2016 NSSC 70]

[18] The affidavit of Ms. Gaetz makes reference to an $1,800.00 (includes HST) flat fee that was negotiated between Veranova and the Bank. (*Viva voce* evidence

of Veranova's Executive Vice-President of Business Development, Mr. John K. Davis, indicated that the flat fee was recently increased to $2,400.00 including HST.)

[19] The flat fee is intended to cover the initial inspection and securing report; securing the property; changing locks; occupancy checks; inspections; drive-bys; grass cutting; winterizing; snow removal and salting; and, photographs showing the condition of the property when first secured.

[20] The Flat Fee Service Summary Report, attached as Exhibit "C" to the Gaetz affidavit, lists actual flat fee charges. The total added up to $1,219.00. Instead of claiming the flat fee amount the lower figure was used to calculate the deficiency judgment amount.

[21] The $1,219.00 includes a mark-up of $342.99 (includes HST). The actual amount charged to Veranova by its third party service providers was $876.01. As a percentage, this represents a mark-up of 39.15 percent (calculated as $342.99 ÷ $876.01 x 100% = 39.15%).

[22] There are additional, so-called non-flat fee charges, for such things as garbage removal; cleaning; locksmith; delivery of keys; mold removal; removal of car; initial grass cut; dump fees; and, water and electricity. These charges total $4,433.46 (includes HST). Included in this amount are additional amounts charged by Veranova for arranging to have the work done. Based on paragraph 8 of the Gaetz affidavit (which references the attached Exhibit "D" and Exhibit "B"), the total mark-up was $1,089.06. This mark-up applies to third party invoices submitted by contractors hired by Veranova totalling $1,972.75. As a percentage, this represents a 55.21 percent mark-up (calculated as $1,089.06 ÷ $1,972.75 x 100% = 55.21%). If one was to include the cost for utilities, the mark-up percentage would be reduced to 32.56 percent (calculated as $1,089.06 ÷ $3,344.40 x 100% = 32.56%).

[23] The monetary mark-ups are set out in the affidavit of Ms. Gaetz. The calculations to determine the percentage mark-up, however, are not. In future, in addition to providing actual third party invoices and a description of the work or services provided, counsel are urged to provide not only the monetary mark-up charged by the property management company to the lending institution but also the equivalent percentage mark-up calculated as a percentage of the amount charged to the property management company by its contractors.

[24] During his testimony, Mr. Davis calculated the percentage mark-up based on the amount Veranova billed the client. The Court challenged this. In a subsequent

letter from counsel, Mr. Kingston, agreed with the methodology suggested by the Court.

[25] By way of example: If third party invoices totalled $50.00 and the property management company billed its' client $100.00 the percentage mark-up is not 50 percent (i.e. $100.00 - $50.00 = $50.00; $50.00 ÷ $100.00 x 100% = 50%) but rather it is 100 percent ($100.00 - $50.00 = $50.00; $50.00 ÷ $50.00 x 100% = 100%). The mark-up should reflect the amount billed by the property management company to its' client as a percentage of what it paid to its' contractors and field agents.

[26] Aside from this, the affidavit evidence in support of the amounts claimed for property management and other protective services has greatly improved, likely in response to the Honourable Associate Chief Justice Deborah K. Smith's decision in ***Fogerty***, *supra*, and the Honourable Justice Gregory M. Warner's decision in ***CIBC Mortgage Inc. v. Samson- Hahn***, [2015] NSJ No. 219, 2015 NSSC 219; 245 CarswellNS 454. I will say more about these two decisions later in my decision. Counsel generally provide adequate supporting documentation that describes the work or service provided and the dates when the activities were performed. Without this the Court cannot determine the reasonableness of the costs incurred. The Court is then left with no option but to deny the amount claimed.

[27] In addition to the affidavits filed by counsel, the Court, as previously indicated, heard from Veranova's Executive Vice-Present of Business Development, Mr. John K. Davis. Mr. Davis provided evidence regarding Veranova's corporate structure and the nature of the services provided to its' clients particularly in the Atlantic Region.

[28] Mr. Davis testified that Veranova employs a number of people in its' Dartmouth office. They also contract out work to twenty field agents located throughout Nova Scotia. The field agents are not employees of Veranova. They are retained on an "as-needed" basis and are paid for their services monthly.

[29] As part of the service provided by the field agents, a report is produced at the time the property under foreclosure is first inspected and secured. The field agent is expected to not only assess the condition of the property but to also recommend needed repairs to ensure the property is made safe and ready for eventual sale. Veranova, in turn, reports to its' client and seeks the client's authorization before undertaking any needed repairs. Once authority has been granted, Veranova assigns the work to its' field agent provided the field agent is qualified to do the work. If the work requires a skilled tradesman, such as a plumber or an electrician, Veranova

would then seek someone with the requisite skill to do the work. In addition to negotiating a fair and reasonable price, Veranova also oversees the work to make sure that it has been done properly.

[30] Veranova also arranges to have any garbage left behind removed. Once this has been done, the property is given a general cleaning. Arrangements are also made to transfer electric power and other utilities to Veranova's account. The cost of these services as well as home heating fuel are borne by Veranova during the tenure of its' management of the property. These costs are ultimately billed to the client when the file is closed.

[31] A great deal of what Veranova does is charged at a set price. Many of the routine services such as weekly drive-by inspections, grass-cutting, snow removal and the like fall within this category. Much of the cost is covered in the flat fee charged to the client (which now stands at $2,400.00, HST included). Other non-routine work is charged at an hourly rate negotiated by Veranova with its' field agent. This includes such things as house cleaning and some minor repairs that do not required the services of qualified tradesmen.

[32] Mr. Davis indicated that Veranova tries to achieve margins of 30 to 32 percent across the full range of services provided. The company also strives to earn net income after covering all its costs (both fixed and variable) of 8 percent. He shared with the Court that the company has generally not succeeded in realizing this 8 percent profit margin.

[33] To assist the Court, Mr. Davis presented a list of the kinds of expenses and service support items which are factored into Veranova's fee structure. The list (entered as Exhibit No. 1) also provided a description of the various management oversight services provided by Veranova. (For ease of reference, I have attached a copy of the exhibit to this decision).

[34] Mr. Davis provided further clarification of the regular percentage mark-ups Veranova applies to the different categories of work or services it contracts out to its' field agents and other third party suppliers. For cleaning and the like, the mark-up is normally 30 percent or higher. For inspections and activities associated with securing the properties, the mark-up is generally 40 percent or more. Given the fact that Mr. Davis incorrectly calculates the percentage mark-up based on the total amount charged to Vernova's client instead of the amount Veranova is billed by its agents and third party contractors, the actual mark-ups are even higher than indicated. The Court takes no issue with Veranova being paid for the services it

provides. This is a matter for the company and its' clients. The market should be allowed to set those prices without interference from the Courts. The role of the Court is to determine what should then be passed on by the lending institution to the mortgagors.

[35] The Court's role is to determine whether the expenditures were properly and reasonably incurred to preserve the property in order to realize the best possible resale price. In so doing, any potential claim for deficiency against the mortgagor should be minimized.

[36] Before commenting on what I consider to be a reasonable mark-up for the services provided by the property management company I will turn my attention to the relevant parts of *Civil Procedure Rule* 72 – Mortgages, along with Practice Memorandum No. 1 (in particular Part III – Motions for Deficiency Judgment or Distribution of Surplus) and the case law that pertains to the issues that are now before the Court.

Civil Procedure Rule 72 – Mortgages, (Practice Memorandum No. 1/Part III) and the Existing Case Law

[37] *Civil Procedure Rule* 72, Mortgages, establishes the procedure for the remedy of foreclosure and related processes including, in *Rule* 72.01(2), a deficiency judgment.

[38] In cases where default judgment has occurred or an application is uncontested or any issues in contest have been determined, the resulting order "*may provide for a default deficiency judgment under Rule 72.11 to 72.13*." [See Rule 72.07(6)].

[39] For ease of reference, I will reproduce *Rules* 72.11 to 72.13 in their entirety:

> **Deficiency judgment**
>
> 72.11 (1) A statement of claim or notice of application for foreclosure, sale, and possession may include a claim against a person who is liable for the amount, if any, by which the mortgage debt exceeds the amount realized from the sale.
>
> (2) A mortgagee who claims a deficiency judgment may have default judgment for the deficiency against the party claimed to be liable for the mortgage debt, unless the party claimed against files a notice of defence or contest, or attends at the hearing of the application for an order for foreclosure, sale, and possession and obtains permission to contest the claim.

(3) The effective date of the default judgment is fifteen days after the applicable of the following dates:

(a) the date of a sale by public auction, if the mortgagee purchases the property;

(b) the day the balance of the purchase price is paid to the sheriff or other person conducting a sale by public auction, if a person other than the mortgagee purchases the property;

(c) the date of closing, if the sale is by approved agreement.

(4) The amount of the default judgment must be assessed by a judge.

(5) Interest is calculated in accordance with the mortgage until the effective date of judgment and in accordance with the Interest on Judgments Act afterwards.

(6) The judgment extinguishes six months after its effective date, unless a notice of motion for an assessment of the amount of the deficiency is filed.

Motion for assessment of deficiency

72.12 (1) A mortgagee who seeks an assessment of a deficiency must file a notice of motion to assess the amount of the deficiency before one of the following deadlines:

(a) six months after the effective date of the default judgment, if the sale is by public auction;

(b) ten days after the day of the closing of a sale by approved agreement.

(2) A mortgagee who makes a motion for a deficiency judgment against a party who has not designated an address for delivery must, unless a judge orders otherwise, give notice of the motion to the party in the same way a party is notified of a proceeding under Rule 31 - Notice, as if the notice of motion were an originating document.

(3) The notice must be delivered no less than ten days before the day the motion is to be heard, unless a judge orders otherwise.

Calculation of deficiency

72.13 (1) A judge may calculate the deficiency by subtracting one of the following amounts from the outstanding principal, mortgage interest, judgment interest, reasonable charges authorized by the mortgage instrument, and costs:

> (a) the balance of the sale price paid to the mortgagee, if the property is sold by public auction or approved agreement to a person other than the mortgagee;
>
> (b) the amount reasonably realized on resale, if the property is sold by public auction to the mortgagee or its agent, it is resold by the mortgagee, and the resale price received by the mortgagee is both reasonable and greater than the bid;
>
> (c) the amount bid by, or on behalf of, the mortgagee, if the property is sold by public auction to the mortgagee and the resale price or the value of the property is less than the bid;
>
> (d) the value of the property, in all other circumstances.
>
> (2) A mortgagee who claims that an expenditure is a reasonable charge authorized by the mortgage instrument must demonstrate the claim by evidence specifically set out in an affidavit of the mortgagee, or its agent, showing all of the following:
>
> (a) the term in the instrument authorizing the expenditure to be made and charged to the mortgage debt;
>
> (b) the necessity of the expenditure for preserving or otherwise protecting the mortgaged property;
>
> (c) the reasonableness of the amount of the expenditure both in its fairness for the work done or materials supplied, and its value for protecting the property.

[40] *Rule* 72.14 deals with surpluses which is not the situation now before the Court and so will not be reproduced although by reference it is included in Practice Memorandum No. 1 ("PM No. 1").

[41] There is no need to reproduce all of Part III of PM No. 1. Only those portions particularly relevant to the issues now before the Court need to be referenced. They are, as follows:

> **3.2 Purpose**
>
> The plaintiff's claim crystalizes in the Order of Foreclosure, Sale, and Possession. The order confirming sale confirms the provisions of the Order of Foreclosure, Sale, and Possession were carried out. It cannot confirm or otherwise deal with any claim the plaintiff may have which accrued after the date of the Order of Foreclosure, Sale, and Possession.

3.3 General Provisions

(a) The originals or true copies of all invoices or receipts from all independent suppliers of goods, materials, and services relating to the claim must be filed with the court for inspection. Where a property manager has been retained whose own personnel have provided goods, materials, and services in the management of the property under foreclosure, verification must be provided by affidavit stating who performed the work, their trade qualifications (if any), their hours of work, and hourly rates charged.

(b) The amount will be determined by adjusting the mortgage debt as settled in the Order for Foreclosure, Sale, and Possession. In addition to the amounts evidenced by the order and the Sheriff's Report, the Court will take into account interest to the date of default judgment, judgment interest after that date, taxation of costs, taxation of disbursements and allowable protective disbursements after the date the Notice of Action except those included in the amount settled by the Order for Foreclosure, Sale, and Possession. Particulars of protective disbursements and taxable disbursements are to be set out in an affidavit and must include sufficient detail to show work done or material provided, the necessity of work or material, the necessity of other kinds of charges and the recoverability of the charges.

(c) Notice of all motions, together with all supporting documentation, shall be given to the mortgagor and, where there is a surplus, to all subsequent encumbrancers disclosed in the certificate attached to the affidavit of the solicitor upon the application for foreclosure, sale, and possession, and on any subsequent encumbrancer disclosed in a sub-search to the date of filing of the Notice of Motion. Such service shall be effected by personal service or as otherwise ordered by the Court.

…

3.5 Claim for Deficiency

(a) Motions for a deficiency judgment must be filed within six months of the sheriff's sale on ten days notice. A deficiency occurs where "the amount realized is insufficient to pay the amount found to be due to a plaintiff for principal, interest and disbursements as authorized by the mortgage instruments and costs". Where the mortgagor has so contracted and the mortgagee has so pled, the mortgagee has the right "to expend moneys to protect the property and to recover the same on a claim on the covenants so long as the expenditures were properly and reasonably incurred to realize the best price possible so as to minimize a claim for a deficiency against the mortgagor." (Nova Scotia Savings and Loan Co. v. MacKay and MacCulloch (1980), 41 N.S.R. (2d) 432 (S.C.-T.D.) at para. 16 quoted with approval in Royal Bank of Canada v. Marjen Investments Ltd. (1998), 164 N.S.R. (2d) 293 (C.A.) at para. 59.) The Court will allow

only those items which: (a) are authorized by the mortgage; (b) were necessarily expended for the purpose of preserving and protecting the property; and (c) are demonstrated by evidence to have been necessary and reasonable, the specifics of which are set out in an affidavit of the mortgagee or its officer.

(b) The affidavit in support of the motion for deficiency judgment should contain the following: original appraisal report(s) and a copy of the sheriff's report, order confirming sale, certificate of taxation, evidence supporting protective disbursements as set out in paragraph 3.3 and 3.5 and a calculation of the amount of the deficiency.

(c) A mortgagee who wishes to have the hearing of a motion for a deficiency judgment adjourned must make a motion for an adjournment to a date certain, unless a judge permits a motion for an adjournment without day. The motion for an adjournment to a date certain may be made by correspondence that includes representations about the reasons for the request, any previous adjournments, when the mortgagee will be ready, the consent of the mortgagor if the notice of motion has been served, and a convenient time and date for the adjourned motion to be heard. If the reason for the adjournment is a need for substitute service, the representations should include an estimate of the time required to obtain and give effect to an order for substitute service. If it is because a sale has been agreed to, information on the time needed to close should be provided.

3.7 Commentary on Protective Disbursements

A claim for a protective disbursement must be supported by evidence and explained in a chambers memorandum. A claim for a protective disbursement will not be allowed unless the mortgage provides for both the payment and its inclusion in the mortgage debt. The memorandum should refer to the term relied upon and if its meaning is in any way open to interpretation, the memorandum should provide a submission for interpretation mindful that the term is part of an adhesion contract. The affidavit on behalf of the mortgagee must contain sufficient detail so the Court can ascertain whether the disbursement is within the wording of the mortgage, whether the expenditure was necessary and whether the amount was reasonable. The following comments describe experiences of chambers judges in recent years, with the intention that this may provide some guidance as to claims that will likely be unsuccessful, claims that will require sound explanation and claims the amount of which will be closely scrutinized.

(a) Administrative Fees – Fees charged for efforts made by employees, such as on account of a missed payment or an NSF cheque or to inspect the mortgaged premises, have generally been rejected.

(b) Credit Reports, Trace Searches and Demand Letters – The cost of these has generally been refused. Disbursements for reports or searches may be taxable if they were incurred to effect service or used in a motion for substituted service.

(c) Appraisals and Surveys – Ordinarily one appraisal is allowed as a taxable disbursement on a deficiency judgment motion. Generally, judges have refused to allow the cost of appraisals or surveys obtained for the mortgagee's own purposes.

(d) House Sitting – Plaintiffs may expect close scrutiny of the cost and necessity, including frequency, of charges for mowing, snow removal, cleaning, maintenance, repairs and inspection. Commissions or flat fees, such as "weekly inspection" or "maintenance fee", are not generally allowed unless the cost is, by evidence, tied to specific services and justified.

(e) Insurance – Premiums for policies insuring against fire and similar perils will only be allowed upon proof that the mortgagor's policy was terminated. The mortgagee should also file with the court an undertaking that the balance will be credited against the mortgage debt if the policy is cancelled before its usual expiry. Premiums for liability policies are generally not allowed.

(f) Costs Associated with Environmental Concerns – In order for the cost of an environmental assessment or any remedial work to be allowed, there must be evidence establishing the need for the assessment or remedial work. The need to replace an oil tank must be proved before the cost of replacing the tank is allowed.

(g) Improvements – The need for and cost of making improvements, such as replacing a chimney or furnace or rebuilding a deck, will be closely scrutinized. There will be a presumption that an improvement made after appraisal increases the property's value, and its cost will not usually be included in a deficiency judgment.

(h) Real Estate Commission – Some mortgagees receive a reduction in the amount of the real estate commission charged on sale of a property. The mortgagor is to receive the benefit of any such reduction. A mortgagee is only entitled to receive credit for the amount of the real estate commission actually paid.

3.8 Documentation

The documentation required on all motions is:

(a) Notice of Motion – The notice must refer to the Civil Procedure Rule being relied upon, and must enumerate which of the claims is being made. If there is a claim for a surplus, the notice must be directed to the

> respondents and all subsequent encumbrancers and it must include counsel's certificate that all subsequent encumbrancers are listed.
>
> (b) Affidavit by or on behalf of the mortgagee – The affidavit is to be of the mortgagee, an officer or employee of the mortgagee or the management company engaged by the mortgagee. It is not to be an affidavit of the mortgagee's solicitor. There will be attached to this affidavit as exhibits all documents necessary to establish each of the claims being made by the plaintiff. These shall include the following:
>
> > (1) a statement showing the calculation of the plaintiff's claim for interest, the rate used and the per diem amount;
> >
> > (2) a listing of any protective disbursements claimed which were not already included in the Order of Foreclosure, Sale, and Possession and which are otherwise permitted by this Memorandum. The list shall itemize each disbursement by category and show the total amount claimed in each category. Information must be provided to demonstrate the necessity for incurring the protective disbursements, and;
> >
> > (3) statement showing details and calculation of any claim for judgment interest accruing after the date of judgment up to and including the date of motion, and in any event no longer than six months after the date of sale.
>
> (c) Affidavit of Service.

[42] Part III of PM No. 1 provides a considerable amount of direction to counsel presenting motions for the assessment of deficiency judgments. In my experience counsel have welcomed the Court's efforts in providing this assistance. The members of our Court have sought to provide not only clarity but also consistency in how these matters will be dealt with. Counsel should not only know what evidence is required to support a claim for a deficiency, they should also be able to predict what type of claim will likely be approved and what will not.

[43] In ***Royal Bank of Canada v. Marjen Investments Ltd.***, *supra*, the Honourable Justice Nancy Bateman, at para. 31 stated the following (which I believe merits repeating):

> 31 The Court's focus on an application for deficiency judgment on foreclosure is to ensure that the mortgagee recovers no more than "is just and reasonable" (per Hart, J.A. in *Adshade*, *supra*). When the mortgagee has purchased the property at the Sheriff's sale, and applies for a deficiency judgment, prior to resale, it is reasonable for the Court to look to objective evidence of value (per Hallett, J.A. in

> *Nova Scotia Savings and Loan v. MacKay, supra*). It may be that the price paid by the mortgagee at the sale is an acceptable amount, particularly where there has been competitive bidding. On the other hand, the purchase price may be nominal, in which case, it is appropriate to assign a more realistic value. This ensures that the mortgagee does not, after obtaining a deficiency judgment, resell the property for an amount greater than the price paid at the Sheriff's sale and thereby effect double recovery. Where the property has not been resold, the best evidence of value is generally established through appraisals. When the property has been resold, however, and, particularly, when subjected to vigorous marketing efforts, as in *Offman, supra,* the Court should generally not depart from the selling price. Appraisal reports are a best guess, albeit by a person experienced in the real estate field. It is the market that actually determines the value of the property.

[44] In the case of ***Scotia Mortage Corp. v. Fogarty***, *supra*, the Honourable Associate Chief Justice Deborah K. Smith of our Court referred to ***Marjen***, *supra*, in para. 16 as follows:

> 16 The court's focus on a motion to assess a deficiency judgment is to ensure that the mortgagee recovers no more than "is just and reasonable" (per Bateman J.A. in *Royal Bank of Canada v. Marjen Investments Ltd. et al.*, 1998 NSCA 37, (1998), 164 N.S.R. (2d) 293 at P31 relying on Hart J.A. in *Central Trust Co. v. Adshade* (1983), 60 N.S.R. (2d) 414).

Smith, ACJ, went on to say, at para. 17, the following:

> 17 The obligation is on the mortgagee to provide the court with evidence which will allow it to determine that the expenses claimed were properly and reasonably incurred. Civil Procedure Rule 72.13(2) provides:
>
> > **Calculation of Deficiency**
> >
> > 72.13 ...
> >
> > (2) A mortgagee who claims that an expenditure is a reasonable charge authorized by the mortgage instrument must demonstrate the claim by evidence specifically set out in an affidavit of the mortgagee, or its agent, showing all of the following:
> >
> > > (a) the term in the instrument authorizing the expenditure to be made and charged to the mortgage debt;
> > >
> > > (b) the necessity of the expenditure for preserving or otherwise protecting the mortgaged property;

> (c) the reasonableness of the amount of the expenditure both in its fairness for the work done or materials supplied, and its value for protecting the property.

[45] In the case of ***CIBC Mortgages Inc. v. Samson-Hahn***, *supra*, the Honourable Justice Gregory M. Warner of our Court, provided the following comments in relation to the utility of using the services of property managers at paras. 31 – 33:

> 31 In principle, it is reasonable for a mortgagee to hire a property manager to physically manage the properties it takes possession of in the course of foreclosure proceedings, and for the property manager to contract out services to independent subcontractors, include the hiring of inspectors and, when necessary, qualified professional tradesman (such as the electrician in this case).
>
> 32 In principle, it is appropriate for the property manager to recover its reasonable costs, including a reasonable markup for administration and supervision of the work of its subcontractors, contingent upon how the contract between a mortgagee and the property manager provides for its compensation.
>
> 33 Having accepted that, in principle, a mortgagee is entitled to contract out services to a property manager and to provide reasonable compensation to the property manager, it is still required that a mortgagee prove to the court, by affidavit evidence containing sufficient evidence, that the expenditure claimed against the mortgagor is an expenditure a mortgagee, by the wording of the mortgage, is entitled to recover; that the expenditure is necessary to preserve the property; and, that the amount of the expenditure is reasonable, both in the context of the work done and its value in protecting the property.

[46] In addressing the issue of the property manager's mark-up, Warner, J. offered this, at para. 40:

> 40 Also, there is no evidence of the reasonableness of the property manager's markup, absent some evidence that this was, by its contract with the mortgagee, its only compensation for obtaining and supervising the work. The Court is not prepared, absent evidence about the contract between the property manager and the Plaintiff, to conclude that the addition of the markup was reasonable. If the property manager received from the Mortgagee no other compensation for its work, which has not been established, then it might be that the amount of the markup, which appears to be in the range of 10%, is not unreasonable.

[47] Justice Warner also provided a concise summary of the things he was prepared to approve and those things he was not willing to approve due to a lack of evidence particularly in respect to the mark-up applied to third party invoices by the property management company. The property management company happened to be Veranova Properties.

[48] In the case now before me I have been presented with oral evidence that Justice Warner and Associated Chief Justice Smith did not have. As a result, I am in a better position to assess the reasonableness of the mark-ups charged by the property management company.

[49] I am somewhat constrained, however, in that I do not have any evidence of what Veranova's competitors charge for similar kinds of work. But since my focus is not so much on what the mortgagee is prepared to pay for the services it receives from the property manager but rather on what the Court is prepared to allow the mortgagee to recover as being "just and reasonable" I do not feel so constrained as to be unable to approve what I feel is a reasonable mark-up in the context of this case. It should also provide some direction to counsel on what to expect in other motions of his nature.

Court's Ruling:

[50] After considering the evidence presented, both by way of affidavits and orally, I am prepared to approve a mark-up in the range of 25 to 30 percent on all flat fee and non-flat fee work performed by Veranova's field agents and any independent contractors engaged by the company. The mark-up should generally not exceed 25 percent unless the property management company is called on to perform extra work to obtain qualified sub-contractors at the best possible prices. In these situations the mark-up can approach but not exceed the 30 percent maximum.

[51] It should be understood that any and all claims must be supported by sufficient evidence to meet the requirements of *Civil Procedure Rule* 72 and PM No. 1 (specifically Part III). A failure on the part of counsel to provide sufficient evidence to allow the Court to satisfy itself as to the necessity and reasonableness of the expenditure for preserving and protecting the property will result in a denial of the amount being claimed. As indicated earlier, I think there has been an overall improvement in the quality and sufficiency of the information being provided by counsel in recent months. Nothing in this decision should detract from this practice.

[52] In addition to the across-the-board mark-up, property management providers will also be permitted to charge interest at the rate of 5 percent per annum (consistent with interest allowed by the *Interest on Judgments Act*, RSNS 1989, c. 233) on any utility bills (electricity, water, heating fuel, etc.) paid by the property management provider as calculated from the date the invoice is paid.

[53] I would ask counsel to recalculate the deficiency claim for this file and the other five files that have been held awaiting my decision. This can be done by way of a supplementary brief.

Glen G. McDougall, J.

JUDGE'S EXHIBIT # 1

Veranova Properties Limited
Management Services

Veranova Properties Ltd. Provides property management services to various lending clients. In so doing we incur various business expenses and service support items, which are factored into Veranova's fee structure. These include:

- All Veranova staffing expenses for file management, accounting services, senior management oversight and technical support.
- All Technology support including client mandated platforms and communication expenses.
- All office services related expense including occupancy costs.
- Banking charges, liability insurance, travel and all other direct and indirect expenses associated with running a professional property management business.
- File Management oversight includes the following responsibilities:
  - Complete property condition review, including structural and environmental defects assessment and health and safety repair assessment.
  - Ongoing assessment for asset security and preservation.
  - All utility re-routing, arrears management and payments.
  - All contractor work payments, scope of work management and work completion quality control.
  - All aspects of file administration to include documentation, communication and activity coordination.
  - All other accounting support services to include bill payment, posting, record keeping and collections.
  - Payment of any condo or lot rental fees, where applicable.
  - Coordination of all visit and access activity related to the property